



**THE ATTORNEY GENERAL
OF TEXAS**

GERALD C. MANN
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ATTORNEY GENERAL

AUSTIN 11, TEXAS

OVERRULED BY 0-7323 insofar as
there is conflict.

Honorable Joe C. Gladney
Criminal District Attorney
Henderson, Texas

Dear Sir:

Opinion No. 0-4020

Re: Whether or not a superintendent
of an independent school dis-
trict is an "officer" under the
terms of Article 159, P.C.; and
other related questions.

This is in reply to your request for our opinion as to what crime,
if any, certain facts outlined in your letter constitute.

The facts you give are briefly as follows: A superintendent was
employed by the school board of an independent school district.
This district had one negro school, which had negro teachers. The
superintendent collected money from the negro teachers, as follows:

(a) One colored teacher paid the superintendent \$15.00 per month.
When the first pay day came the superintendent handed said teacher
her check, and the superintendent told her she must pay him \$15.00
each month which amount he said was his "traveling expenses". We
assume from your letter that the teacher believed said statement,
but that it was false, and that the teacher accordingly paid the
\$15.00 to the superintendent each month. We further understand
that the money was not "traveling expenses" and that it was appro-
priated by the superintendent to his own use.

(b) Another colored teacher paid the superintendent \$20.00 per
month. The superintendent told her that she would have to pay him
that amount each month to reimburse him because "he had spent a
lot of money around the colored school". We assume from your
letter that she believed him and paid said sum each month, but
that the statement that "he had spent a lot of money around the
colored school" was false.

(c) Another colored teacher paid the superintendent \$17.50 per
month during the school year. The teacher's salary check each
month was \$92.50 and the superintendent told her that all of
her salary over \$75.00 should be paid back to him, and that that

part of her salary was being used "to help get the school standardized". We understand that she relied on said statement and paid the superintendent that amount each month. We also understand that said statement in regard to said money being used to get the school standardized was false.

It is our understanding that in each case the money collected from the teachers was appropriated by the superintendent to his own use, and that in the instance of each false statement made by him he knew it was false when he made it.

You ask two questions, as follows:

1. Is the superintendent of an independent school district an officer within the meaning of Article 159 of the Penal Code?
2. What offense, if any, is the superintendent in this case guilty of committing?

We will proceed to answer your first question, which involves Article 159, P.C. Said Article reads as follows:

"Any legislative, executive or judicial officer who shall accept a bribe or consent to accept a bribe under an agreement or with an understanding that his act, vote, opinion or judgment shall be done or given in any particular manner or upon a particular side of any question, cause or proceeding which is or may thereafter by law be brought before him, or that he shall make any particular nomination, appointment, or do any other act or omit to do any act in violation of his duty as an officer, shall be confined in the penitentiary not less than two nor more than ten years."

The term "legislative, executive or judicial officer", in said article, is defined in the next article, to-wit, Article 160, Penal Code, as follows:

"Under the name of executive, legislative and judicial officers are included the governor, lieutenant-governor, comptroller, secretary of State, state treasurer, commissioner of the general land office, commissioner of agriculture, commissioner of insurance, superintendent of public instruction, members of the legislature, aldermen of all incorporated cities and towns, judges of the supreme, district and county courts and of the courts of appeals, attorney general, district and county attorneys, justices of the peace, mayors and judges of such city courts as may be organized by law, county commissioners, school trustees, and all other city, county and State officials."

These two articles were construed in the very recent case of *Bigham v. State*, (Tex.Ct.Cr.App.) 148 S. W. 2nd 835, in which the court held that a Deputy Supervisor of the Oil & Gas Department of the Railroad Commission was an officer within the meaning of this statute. However, it was pointed out that this particular position was created by a statute, to-wit, Article 6031, R.C.S., and that persons holding said position were referred to as "officers" in another statute, to-wit Article 1112b, R.C.S. In discussing the matter further, the court said:

"We early held in the case of *State v. Brooks*, 42 Tex. 62, that a deputy sheriff was an officer within the contemplation of the law, and it was again so held in the case of *Reed v. State*, Tex. Cr. App., 149 S.W. 2d 119, decided February 5, 1941, not yet reported (in state report). It was also held that an assistant director of the Motor Transport Division of the Railroad Commission was either an officer or a de facto officer. Again, we think that Art. 6030, supra, providing for the appointment of a deputy supervisor and prescribing his duties, gives ample grounds for a legal inference that such deputy was an officer in contemplation of this statute. While not a necessary adjunct, nevertheless the fact that a person receives his position by appointment is at least persuasive to some extent that such position is an office; if he receives such merely by employment, the inference might lean toward the fact that he was but an employee.

An interesting case from another state, to-wit, the case of *Mootz v. Belyea*, 60 N.D. 741, 236 N.W. 358, 75 A.L.R. 1347, holds that a school teacher is not an officer; and in that case the court said:

"...The duty of employing teachers is vested in the school board, and this is done by contract. The relationship is purely contractual in this state. There is no fixed tenure of office when a teacher is employed, other than the provisions set forth in the contract. In this state the profession is not under civil service rules. When a teacher is employed by a school district she is not employed as an officer and she does not become an officer. Her rights are measured by the terms of her contract. As said in *Board of Education of South Milwaukee v. State ex rel. Reed*, 100 Wis. 455, 76 N.W. 351, 353, the teacher 'was a mere employee, and not an officer of the district in question, and had no official relations to it. His services were to be rendered in consideration of a certain stipulated compensation. He was not an officer, within the meaning of the constitution and laws.'

"The relationship between the teacher and school directors is purely contractual. *Clune v. School District*, 166 Wis.

452, 166 N.W. 11, 6 A.L.R. 736; State ex rel. O'Neil v. Blied et al., 188 Wis. 442, 206 N.W. 213.

"Heath v. Johnson, 36 W. Va. 782, 15 S.E. 980, says: 'The occupation of a teacher of a free school in this state is not a public office, but an employment.'

"In State ex. rel. Lewellen et al. v. Smith et al., 49 Ne. 755, 69 N.W. 114, it is said: 'A contract to teach in one of the free schools of the ordinary districts is one of employment. The district, represented by the board, is an employer, and the teacher an employee. The teacher in such schools is not a public officer.'"

In 75 American Law Reports 1352 is an annotation, which says:

"The courts are almost unanimous in holding that the position of a teacher is that of employee, resting on the contract of employment, and not that of public officer."

It is our opinion that a superintendent of an independent school district is not an officer within the meaning of said Article 159, P.C. Our answer to your first question is "No".

We will now proceed to answer your second question. We have examined the statutes, and we have been unable to find that the acts of the superintendent, as outlined by you, constitute any offense, except swindling. Swindling is defined in Article 1545, Penal Code, as follows:

"'Swindling' is the acquisition of any personal or movable property, money or instrument of writing conveying or securing a valuable right, by means of some false or deceitful pretense or device, or fraudulent representation, with intent to appropriate the same to the use of the party so acquiring, or of destroying or impairing the right of the party justly entitled to the same."

The punishment for swindling is prescribed in Article 1550, Penal Code, to be the same as the punishment for theft, which is prescribed in Articles 1421 and 1422, Penal Code, and that is, that if the value of the money or other property acquired is fifty dollars or over the punishment shall be not less than two nor more than ten years confinement in the penitentiary, and that if the value of the property is under fifty dollars and over five dollars the punishment shall be imprisonment in jail not exceeding two years and by fine not exceeding five hundred dollars, or by such imprisonment without fine, and that if the value of the property is five dollars or under the punishment shall be by a fine not exceeding two hundred dollars.

The elements of the offense of swindling are stated in the case of McDaniel v. State, 63 Tex. Cr. R. 260, 140 S.W. 232, in which the court said:

"...In Blum v. State, 20 Tex. App 578, 54 Am. Rep. 530, the court lays down four distinct elements of swindling, all of which must concur, as follows: (1) There must be an intent to defraud; (2) there must be an actual act of fraud committed; (3) false pretenses must have been made by the accused; (4) the fraud must have been accomplished by means of the false pretenses made use of for the purpose.."

See also the case of Noblitt v. State, 103 Tex. Cr. R. 550, 281 S.W. 849.

Of course, a conviction for swindling under the facts outlined above depends upon said facts being proven, and upon the jury, or the judge in the event a jury is waived, finding that said facts are true.

Under the facts outlined above each transaction in which a sum of money was acquired was a separate offense, and in no instance was the sum of money as much as fifty dollars. Therefore, each of the offenses were misdemeanors.

It is our opinion that under the facts stated above the superintendent in question is guilty of several offenses of misdemeanor swindling. We are unable to find that he is guilty of any other offense.

We hope this opinion will be of some value to you in your effort to prosecute the cases in question.

Yours very truly

ATTORNEY GENERAL OF TEXAS

APPROVED FEB. 19, 1942

GROVER SELLERS

FIRST ASSISTANT
ATTORNEY GENERAL

By

Cecil C. Rotsch
Assistant

CCR:mp:ml